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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 111

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR AMERICAN BOILER MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

Pursuant to the written consent of the parties under Rule 42(2) of the Court, this brief on behalf of American Boiler Manufacturers Association, as *amicus curiae*, is filed in support of the position of National Woodwork Manufacturers Association, *et al.* It urges affirmance of the ruling of the Court of Ap-

peals that the challenged contract provision barring precut doors violated Section 8(e) of the National Labor Relations Act and that the work stoppages called to enforce the provision violated Section 8(b)(4)(A) of that Act.

INTEREST OF AMICUS CURIAE

American Boiler Manufacturers Association (herein called "ABMA")[1] is in a situation comparable to that of respondent National Woodwork Manufacturers Association. It has pending in the Court of Appeals for the Eighth Circuit, on petitions to review orders of the National Labor Relations Board, two cases involving facts substantially identical to those here involved (Nos. 18106 and 18107, *American Boiler Manufacturers Association, Petitioner* v. *Na-*

[1] ABMA is a trade association composed of 36 active members who are engaged in the manufacture of boilers and their major components, and 38 associate members who are suppliers to the boiler manufacturing industry, insuring agents, or quasi-public groups interested in the boiler manufacturing industry. ABMA's 36 active members operate approximately 60 manufacturing plants which are located in 22 states. Employees in 55 of such manufacturing plants are represented by labor organizations. These organizations include affiliates of the Boilermakers Union, the Steelworkers Union, the Machinists Union, and two Electrical Workers Unions.

The approximate value of boilers produced annually in the 60 manufacturing plants operated by ABMA members is in excess of $400 million. These boilers are sold and shipped throughout the United States; they are also shipped to foreign countries. All of ABMA's active members are engaged in operations which affect interstate commerce, and they are therefore subject to the jurisdiction of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).

tional Labor Relations Board, Respondent). These cases arose out of the efforts of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (herein called "the Pipefitters"), to halt the use of so-called "packaged boilers" in the Minneapolis-St. Paul, Minnesota, area. Packaged, or more precisely, shop-assembled, boilers, which many of ABMA's members manufacture,[2] are complete steam generating units; all their various controls and items of external piping are factory attached to form completely finished products on which no further fabrication work need be done at a job site.

In order to promote the purchase and use of "field-assembled" boilers—boilers assembled in large part at the job site—Pipefitters local unions succeeded in incorporating so-called "work fabrication" clauses in their contracts with Minneapolis and St. Paul contractor associations. These clauses, the analogues of Rule 17 here involved, provided, in effect, that contractors would not purchase or install packaged boilers. When some of the contractors—including at least two who were following architect specifications, and another who was installing boilers purchased by a building owner—did not comply with the fabrication clauses, the unions applied coercive pressures to enforce the clauses.[3] The coercive pressures brought about new,

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[2] During 1963, ABMA members produced more than 5,600 packaged boilers, having a total value in excess of $70 million.

[3] An incident involving Minnesota Mining & Manufacturing Company is illustrative. Minnesota Mining purchased three packaged boilers for installation in a building it owned and was renovating, and hired a local contractor to do the instal-

or so-called *ad hoc*, agreements which specifically construed the work fabrication clauses as prohibiting the purchase or installation of packaged boilers.

The *ad hoc* agreements, the Board held in the ABMA cases pending before the Eighth Circuit, were: (1) outside the scope of Section 8(e) of the Act, to the extent that their underlying purpose was to preserve, obtain, or reacquire work for Pipefitters' members; and (2) protected by the construction industry proviso to Section 8(e), to the extent that they involved nonunion parties who were not in a position to assign the work the Pipefitters locals were seeking. *United Association Pipe Fitters Local Union No. 455, et al. (American Boiler Manufacturers Association)*, 154 NLRB 285; *United Association Pipe Fitters Local Union No. 539, et al. (American Boiler Manufacturers Association)*, 154 NLRB 314. Thus, insofar as "work preservation" was relied upon, the Board's ruling in the ABMA cases is comparable to the Board's ruling validating Rule 17;[4] but, insofar as it

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lation work. To prevent the installation, one of the Pipefitters locals threatened a shutdown of the entire project. As a result, Minnesota Mining was forced to capitulate, the boilers were disassembled at the factory and reassembled at the job site, and Minnesota Mining incurred a total added cost of more than $9000.

[4] As used by the Board in the ABMA cases, the "work preservation" concept was given a broader connotation than it bears in the case before the Court. Thus, in the latter case, "preserved work" is work that is "customarily" performed (R. 26); in the ABMA cases, however, "preserved work" was equated with work that union members were seeking to "obtain" or "reacquire" (154 NLRB at 288, 320). See n. 11, *infra*.

rested upon the construction industry proviso to Section 8(e), the Board's ruling in the ABMA cases depends upon an interpretation of Section 8(e) materially at variance with the interpretation underlying the Board's ruling before the Court.

Clearly, the Court's decision in this case will have a significant impact on the ultimate outcome of ABMA's pending Eighth Circuit litigation. But ABMA's interest goes beyond the latter litigation. For the Court's decision, clarifying as it must the permissible bounds of union boycott activity justified under the guise of "work preservation," will necessarily have a far-reaching effect upon methods, practices, techniques, and warranties pertaining to, and used in, the manufacture and distribution of boilers; and it will therefore have a derivative, but nevertheless important, effect upon boiler costs, markets, installers, users, and purchasers.

ARGUMENT

I. Section 8(e) May Not Be Interpreted to Validate Labor Contracts Forestalling the Use of Manufactured Products on Construction Sites.

As set forth in the here pertinent collective bargaining contracts, the "will not handle" language of Rule 17 clearly fell within the literal proscription of Section 8(e) of the Act. The Board, moreover, recognized that Rule 17 was "*prima facie*" unlawful (R. 25). The Board nevertheless concluded that Rule 17 was a lawful provision within the meaning of Section 8(e), because its underlying purpose was to "preserve" and "protect" for job site carpenters cutting and fitting work they "customarily" performed (R. 26-27). The Board's validation of Rule 17 thus was squarely

predicated upon the Board's "work preservation" doctrine—a doctrine which, in its application, has the effect of engrafting upon Section 8(e) an administratively devised proviso.[5]

Now embellished in terms of a "primary-secondary" stereotype (Bd. Br. 10, 36-39), the Board is asking the Court to validate Rule 17 on the basis of the "work preservation" doctrine. But applied to Rule 17, the doctrine is clearly untenable, and ABMA respectfully urges the Court to reject it.

A. A "Work Preservation" Interpretation of Section 8(e) Affecting Manufactured Products Is Inconsistent With Well Defined Congressional Intent.

As Justice Frankfurter said in *Local 1976, Carpenters* v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93, 100, "Most relevant, of course, is the very language in which Congress has expressed its

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[5] The genesis of the Board's "work preservation" doctrine is found in two cases, *Teamsters Local No. 546 (Minnesota Milk Company)*, 133 NLRB 1314 (1961), and *Ohio Valley Carpenters District Council, etc. (Cardinal Industries, Inc.)*, 136 NLRB 977 (1962), both of which were cited by the Board in support of its holding in the case before the Court (R. 25). In *Minnesota Milk*, the Board set forth no rationale whatever for rejecting (133 NLRB at 1316-1317) the Trial Examiner's conclusion, based on a detailed legislative history analysis, that Congress intended Section 8(e) to bar all agreements prohibiting the subcontracting of work (133 NLRB at 1323-1325). In *Cardinal Industries*, the Board virtually ignored the relevant legislative history and read the "work preservation" doctrine into Section 8(e) on the basis of what were termed to be "fundamental concepts of the Act;" but such "concepts" related to jurisdictional disputes, and not to secondary boycotts (136 NLRB at 984-986).

policy, and from which the Court must extract the meaning most appropriate." There is, moreover, no need to advert to legislative history to determine the meaning of a statute that is clear and unambiguous on its face. *United States* v. *Oregon*, 366 U.S. 643-648, *reh. denied*, 368 U.S. 870; *Packard Motor Car Company* v. *National Labor Relations Board*, 330 U.S. 485, 493; *Soldiers, etc.* v. *Wood*, 299 U.S. 211, 216; *Essex County and Vicinity District Council of Carpenters* v. *National Labor Relations Board*, 332 F.2d 636, 641 (C.A. 3); *Mid Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F.2d 613, 623 (C.A. 6). But, these elementary principles aside, it is quite clear that the underlying legislative history affords no support whatever either for the Board's rejection of a literal construction of Section 8(e) or for its own "work preservation" construction.

A complete statement of the legislative history of Section 8(e) is set forth accurately at pages 50-59 of the brief filed with the Court on behalf of Associated General Contractors of America, *et al.*, as *amici curiae*. Accordingly, no useful purpose would be served by repeating the entire statement here. It is of the utmost importance, however, that the relevant history of Section 8(e) be viewed in its true context—the long-range treatment by Congress of the problem of product boycotts—and not as the Board would do (Bd. Br. 13-22), through a myopic perusal of scattered bits and pieces of such history.[6]

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[6] The Board's argument (Bd. Br. 21) that the legislative history of Section 8(e) shows that Congress intended thereby only to outlaw narrow "hot cargo" provisions is totally unpersuasive. Admittedly, as can be amply documented by the legislative history, Congress intended to prohibit "hot

In proper perspective, therefore, a meaningful appraisal of Section 8(e), and what Congress intended to accomplish thereby, must begin with *Allen Bradley*

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cargo" agreements when it enacted Section 8(e). To restrict that Section's impact, however, only to the interdiction of "hot cargo" agreements, in their narrowest sense, not only would brush aside the fact that Congress was patently aware of the breadth of the language of Section 8(e), but it would also fail to take into account the overwhelming evidence that Congress understood completely the relatively narrow nature and thrust of the term "hot cargo." Thus, for example, Senator Goldwater had the following definition of a "hot cargo" clause placed in the Congressional Record (II *Legislative History of the Labor Management Reporting Act of 1959*, p. 1386, hereinafter cited as "*Leg. Hist.*"):

> Hot cargo clause: This is a provision in a collective bargaining contract which seeks to permit *employees to refuse* to perform work on materials or equipment received from or being sent to *another employer with whom the union has a primary dispute.* [Emphasis added.]

Other legislators also showed throughout the debates that their understanding of the limited nature of the "hot cargo" term was the same as Senator Goldwater's. See II *Leg. Hist.* 1007, 1162 (remarks of Sen. McClellan); II *Leg. Hist.* 1162 (remarks of Sen. Kennedy); II *Leg. Hist.* 1197 (remarks of Sen. Curtis); II *Leg. Hist.* 1518, 1523 (remarks of Rep. Griffin); II *Leg. Hist.* 1556 (remarks of Rep. Landrum); II *Leg. Hist.* 1568 (extension of remarks of Rep. Hoffman); II *Leg. Hist.* 1588 (memorandum of Rep. Elliott placed in record by Rep. Bolling); II *Leg. Hist.* 1593 (remarks of Rep. Roosevelt); II *Leg. Hist.* 1703 (extension of remarks of Rep. Roosevelt); II *Leg. Hist.* 1616, 1620 (extension of remarks of Rep. Borch).

Certainly, in view of that understanding, had Congress in fact intended to restrict Section 8(e)'s prohibition to narrow "hot cargo" provisions, it would have been a relatively simple task of legislative draftsmanship to signify such intent in language appropriately circumscribed.

Co. v. *Local 3, Electrical Workers*, 325 U.S. 797 (1945). *Allen Bradley*, as the Court of Appeals recognized (R. 162-163), showed the inadequacy of antitrust remedies in dealing with product boycotts, and that case had a substantial role in Congress' original efforts to prohibit such boycotts.[7] In *Allen Bradley*, a union sought to close the New York City market to products manufactured elsewhere. The union involved was concerned neither with unionization nor with improving working conditions in the factories of manufacturers whose products the union was seeking to keep off the market. On the contrary, the interest of the union in *Allen Bradley*—like that of the Council here—was to preserve work for its members; and the flat assertion in the Board's brief (Bd. Br. n. 24, pp. 26-27) that "the union's purpose [in *Allen Bradley*] was not to protect the work opportunities of the employees immediately involved" is plainly erroneous.[8]

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[7] *Legislative History of the Labor Management Relations Act, 1947*, pp. 428, 1055-1056.

[8] The Board states in its brief (Bd. Br. n. 24, p. 27), that the purpose of the union in *Allen Bradley* was "to create a sheltered market for the New York City manufacturers," and that the union's "prohibition upon the use of materials manufactured outside New York was therefore unrelated to the work of the employees of the employers against whom it was enforced." From a common sense point of view, it is difficult to comprehend why a union would be interested in "sheltering" a market for a manufacturer unless it would thereby further its own ends. In any event, the Board's statement is clearly refuted by the Court's factual statement in *Allen Bradley*. Thus, the Court said (325 U.S. at 799):

> *Some of the members of respondent union work for manufacturers who produce electrical equipment similar to that made by petitioners;* other members of respondent

After the enactment of the Taft Hartley Act in 1947, there followed two landmark decisions involving the boycotting of manufactured products by labor organizations. Congressional approval of the first of these cases, *Joliet Contractors Association* v. *National Labor Relations Board*, 202 F.2d 606 (C.A. 7, 1953), *cert. denied*, 346 U.S. 824, where under the then Section 8(b) (4) (A) the Seventh Circuit ruled invalid a union attempt to boycott preglazed sash manufactured off the job site, is indicated by the fact that Congress did not overturn the ruling, or even criticize it, when, in 1959, it enacted Section 8(e).* By con-

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union are employed by contractors and work on the installation of electrical equipment, rather than in its production.

The union's consistent aim for many years has been to expand its membership, to obtain shorter hours and increased wages, and *to enlarge employment opportunities for its members. To achieve this latter goal—that is, to make more work for its own members*—the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product. [Emphasis added.]

* The Board's assertion (Bd. Br. 26-27, n. 24) that the purpose of the union in *Joliet Contractors* was not "work preservation" lacks factual support. Thus, the Court's opinion in that case shows clearly that the union sought to justify its acts on the ground that it "was engaged in the rightful endeavor [of obtaining] more work for its members . . ." 202 F.2d at 610. Moreover, the Board itself in the decision reviewed in *Joliet Contractors* validated the union's bylaws under a work preservation theory, saying in *Glaziers' Union Local No. 27 (Joliet Contractors Association)*, 99 NLRB 1391, 1394: "These bylaws have a clearly legitimate purpose—to provide as much work as possible for glazing employees in the Joliet area."

trast, however, the rule of the second case, *Local 1976, Carpenters* v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93 (1958)—in which it was held that a labor contract authorizing employees to refuse to handle prefabricated doors, although unenforceable by means prohibited by the then Section 8 (b) (4) (A), was nevertheless a lawful contract—was specifically criticized in 1959 and was the specific target at which Congress aimed when it enacted Section 8(e). Congress' uneven treatment in 1959 of the *Joliet* and *Sand Door* cases shows, therefore, a clear intent to stop job site boycotting of manufactured products.

That same intent is explicitly shown in the most authoritative document pertaining to Section 8(e)'s legislative history, the Conference Report (H.R. REP. No. 1147, 86th Cong., 1st Sess. (1959), I *Leg. Hist.* 934). Concerning the "construction industry proviso" to Section 8(e), the Report says (I *Leg. Hist.* 943):

> It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. *The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction* . . . .[10] [Emphasis added.]

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[10] Senator Kennedy similarly explained on the Senate floor that the proviso "does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite" [emphasis added]. II *Leg. Hist.* 1433.

Although, therefore, Congress intended through the "construction industry proviso" to remove from the broad proscription of Section 8(e) certain kinds of agreements pertaining to construction work, it also manifested a clear and specific intent not to remove therefrom agreements pertaining to products and materials shipped to a construction site. And having thus intended and acted, it is inconceivable that at the same time Congress also intended to adopt *sub silentio* a "work preservation proviso" having the effect of cancelling out the explicit limitation Congress placed on the scope of the "construction industry" exemption. Yet this is the precise intent that the Board's interpretation of Section 8(e) would attribute to Congress.[11]

What has been said makes it clear that the Board's "work preservation" doctrine cannot be reconciled with the Congressional intent underlying Section 8(e). Analytical considerations, moreover, support this view. Thus, there would appear to be three main categories of labor contracts pertaining to job site

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[11] Relevant in evaluating the merits of the Board's "work preservation" doctrine is the fact that the doctrine has been accorded far greater scope than its name alone implies. Thus, the term "work preservation" merely suggests a continuance of the *status quo*, and the Board has carefully so circumscribed it for the Court (*e.g.*, Bd. Br. 36-37). But in point of fact, the Board also employs the concept to validate boycott conduct aimed not only at *reacquiring* for union members work they had performed in the past, but at *acquiring* work they had never performed. See *United Association Pipe Fitters Local Union No. 455, et al. (American Boiler Manufacturers Association)*, 154 NLRB 285, 288; *Highway Truck Drivers and Helpers, Local 107 (S & E McCormick, Inc.)*, 159 NLRB No. 1, 62 LRRM 1224, 1225-1226.

work: (1) contracts involving products or materials which cannot be fabricated at the site (for example, glass panes or preformed concrete); (2) contracts involving products or materials which may be fabricated either at the site or elsewhere (for example, precut doors or electrical panels); and (3) contracts involving the rendition of job site labor and having no relation to fabricated products or materials (for example, painting, excavating, or bricklaying).

The Court of Appeals in the instant case inferentially lumped the first two of the foregoing contract categories together as involving "factory-made" products, and, distinguishing "job site work," thereby invalidated Rule 17. The Board, on the other hand, would give like treatment to contracts in the second and third categories, but apparently would distinguish contracts in the first category, and would permit unions, through the work preservation concept, to force out of the market manufacturers whose products, though made elsewhere, arguably can be made at the job site. But under the Board's interpretation, the electrical controls in *Allen Bradley*, the doors in *Sand Door*, and the preglazed sash in *Joliet Contractors*—all products in the second contract category which may be made either at or away from the job site—could lawfully be kept off the job site so long as the union makes a work preservation claim. Certainly, therefore, if the Board's interpretation should be upheld, we would have come full cycle, and the loopholes which were thought to have been closed in 1959 would in fact have been opened wider.

The foregoing classification of labor contracts pertaining to job site work likewise assists in placing in proper perspective the courts of appeals cases the

Board relies on to support its "work preservation" interpretation of Section 8(e) (Bd. Br. 25-27).[12] For, with the exception of the *Houston Insulation Contractors* case, which was a Section 8(b) (4) (B) rather than a Section 8(e) case, it is apparent that none of the cases cited by the Board involved an agreement pertaining to a product manufactured off, but delivered to, a construction job site. As a matter of fact, again with the exception of the *Houston Insulation Contractors* case, all the cited cases involved either job site work having nothing whatever to do with manufactured products, or which, under any standard, did not involve work of any sort pertaining to the construction industry. Significantly, moreover, in none of the cited cases is there set forth a rationale for disregarding the explicit language of Section 8(e) and its underlying legislative history.

Finally, the Congressional intent underlying Section 8(e)—particularly that pertaining to the "construction industry proviso"—demonstrates the irrele-

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[12] *Orange Belt District Council of Painters* v. *National Labor Relations Board*, 328 F.2d 534 (C.A.D.C.); *Meat and Highway Drivers, Local No. 710* v. *National Labor Relations Board*, 335 F. 2d 709 (C.A.D.C.); *Truck Drivers Local 413* v. *National Labor Relations Board*, 334 F.2d 539 (C.A.D.C.), *cert. denied*, 379 U.S. 916; *Lewis* v. *National Labor Relations Board*, 350 F.2d 801 (C.A.D.C.); *National Labor Relations Board* v. *Joint Council of Teamsters*, 338 F.2d 23 (C.A. 9); *Todd Shipyards Corp.* v. *Marine and Shipbuilding Workers Union*, 344 F.2d 107 (C.A. 2); *Houston Insulation Contractors Ass'n.* v. *National Labor Relations Board*, 357 F.2d 182 (C.A. 5), *petition for certiorari filed*, No. 206, this Term; *District 9, Machinists* v. *National Labor Relations Board*, 315 F.2d 33 (C.A.D.C.); *Retail Clerks Union Local 770* v. *National Labor Relations Board*, 296 F.2d 368 (C.A.D.C.).

vance of the Board's contention based on *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, that the fact that an employer must bargain with his employees' representative concerning "subcontracting," or "contracting out," supports a "work preservation" interpretation of Section 8(e) (Bd. Br. 27-29). The scope of the *Fibreboard* holding is clearly circumscribed. The Court itself noted that the term "subcontracting" had "no precise meaning" (379 U.S. at 215), and the Concurring Justices pointed out that the case could have no bearing on a management decision to purchase labor-saving machinery (379 U.S. at 223). Moreover, the case has been narrowly construed and applied by courts of appeals. See *National Labor Relations Board* v. *Adams Dairy, Inc.*, 350 F.2d 108 (C.A. 8); *National Labor Relations Board* v. *William J. Burns International Detective Agency*, 346 F.2d 897 (C.A. 8); and *National Labor Relations Board* v. *Royal Plating and Polishing Co., Inc.*, 350 F.2d 191 (C.A. 3). In any event, Congress' express intent, as shown by the meaning of the construction industry proviso, *supra*, pages 11-12, to include within 8(e)'s proscription agreements concerning products or materials shipped to a job site, compels the conclusion that the *Fibreboard* principle cannot be a controlling, or even a significant, decisional factor in the case before the Court.

II. Contrary to the Board, the Construction Industry Proviso to Section 8(e) Is a Revelant Provision.

The Board contends (Bd. Br. 32) that the construction industry proviso to Section 8(e) is "irrelevant" in the disposition of the 8(e) issue before the Court, asserting (Bd. Br. 36) that "the question of the pro-

viso's applicability to [work preservation] agreements never arises [because] they are *ab initio* outside the intended reach of Section 8(e)." Obviously, in view of the pertinent legislative history pertaining to the proviso, *supra* pages 11-12, the Board's contention has no merit.[13]

That the proviso is not "irrelevant" is underlined, moreover, by the important decisional role the Board assigned to it in its decision in *United Association Pipe Fitters Local Union No. 455, et al. (American Boiler Manufacturers Association)*, 154 NLRB 285, one of the ABMA cases now being reviewed by the Eighth Circuit. There, the Board found that "work preservation" was the purpose underlying labor agreements that prohibited the purchase or installation of packaged boilers. But the existence of this underlying purpose, the Board specifically recognized, did not prevent the agreements from having "secondary" characteristics.[14] Accordingly, the Board regard-

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[13] It is clear that the proviso was intended only to exempt from 8(e)'s scope agreements by which a general contractor agrees not to subcontract job site work to unorganized, nonunion, subcontractors. See the remarks of Representatives Quie, Hagen, Pucinski, and Weis, and Senator Dirksen. II *Leg. Hist.* 1720, 1818, 1821, 1823, and 1841. See also *Essex County and Vicinity District Council of Carpenters* v. *National Labor Relations Board*, 332 F.2d 636, 640 (C.A. 3).

[14] In the ABMA case, the Board treated as "secondary" the employer parties to the agreements there involved who were not "in a position to assign" the work the union was seeking. 154 NLRB at 289. But such employers, it is apparent, had a status comparable to that occupied by general contractors Nason, McDonnell, and Driscoll in the *Woodwork Manufacturers* case, who "did not have control over the assignment

ed their "work preservation" purpose as having the effect of only *partially* exempting the agreements from the scope of Section 8(e); and, to the extent that they were not thus exempted, the Board looked to the proviso to determine—inconsistently with previous Board decisions, as shown below—that the agreements were valid. 154 NLRB at 288-289.

Other positions the Board has taken in the past likewise contradict the Board's present contention concerning the meaning and significance of the proviso. The gist of the Board's contention is that a specific legislative purpose to outlaw contracts sanctioning the boycotting of manufactured products which are brought to a job site cannot be based on Senator Kennedy's statement that the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite" (Bd. Br. 34-36). Inconsistently, however, in the very case now before the Court, the Board originally told the Court that the 8(e) proviso "*was not satisfied here, since the doors were not manufactured on the job site.*" [Emphasis added.] See page 12, footnote 16, of the Board's petition for a writ of certiorari in *National Labor Relations Board, Petitioner* v. *National Woodwork Manufacturers' Association, et al.*, No. 1247, October Term, 1965. To be sure, the Board subsequently filed a Supplemental Memorandum with the Court in which it changed its position, but the change was not effected until after the Board had learned that ABMA had in-

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of the work of cutting out and fitting doors to the jobsite carpenters" (R. 28).

The Board has never explained why it applied different, and, in a real sense, conflicting, rationales in deciding the ABMA and the *Woodwork Manufacturers* cases.

formed the Eighth Circuit that the statement in the Board's certiorari petition reflected an interpretation of the 8(e) proviso different from that the Board was then advancing in the ABMA pending Eighth Circuit litigation (Nos. 18106 and 18107, *American Boiler Manufacturers Association, Petitioner* v. *National Labor Relations Board, Respondent*).

It is also clear that the Board's present position concerning the 8(e) proviso is squarely contradicted by what the Board has said and done in its own decisions. Thus: *Burt Manufacturing Co.*, 127 NLRB 1629, 1633 ("The legislative history [of Sec. 8(e)] shows, however, that the proviso was *not* intended . . . to permit boycotts of goods manufactured in an industrial plant for installation at the jobsite"); *Ohio Valley Carpenters District Council, etc. (Cardinal Industries, Inc.)*, 136 NLRB 977, 988-989 (". . . it seems a distortion of the plain meaning of the statutory words, 'work *to be done* at the site of construction' to read them as synonymous with 'work that *could be done*' or 'work that *might be done*' "). *Accord: Cement Mason Local Union No. 97 (Interstate Employers, Inc.)*, 149 NLRB 1127, 1131-1132 ("It has been the Board's position that a contract dealing with work that is not to be performed at the construction site is not within the protection of the proviso"); *Teamsters Local 294 (Island Dock Lumber, Inc.)*, 145 NLRB 484, 490-491 (The words "work to be done at the site" refer to work that "necessarily must be done there," and do not relate to work that "could equally have taken place off site").

III. A Construction of Section 8(e) That Inhibits Technological Improvement and Preserves Uneconomical Manufacturing Practices Is Unsound.

The use of prefabricated products has grown steadily in the United States. The history of packaged boilers in the Minneapolis-St. Paul area may be regarded as typical. Thus, the records in the ABMA cases pending in the Eighth Circuit, *supra* page 2, show that packaged boilers first appeared in the Minneapolis-St. Paul area in the early 1930's; and that beginning in the early 1950's, when natural gas became available, their sales increased progressively, until, in 1963, between 75 per cent and 85 per cent of the boilers sold in the area were packaged. The increased acceptance of packaged boilers is attributable to their improved quality, lower cost, and, most importantly, to the fact that they are factory tested and inspected, thus enabling the manufacturer to warrant the complete boiler against defects.

The brief *amici curiae* filed with the Court on behalf of Associated General Contractors of America, *et al.*, points out at pages 23-28 that the growth in prefabrication as a production method is a result of technological advances in manufacturing techniques, and that it is unsound policy to adopt a construction of Section 8(e) tending to inhibit technological improvement and to preserve uneconomic manufacturing practices. Data and arguments supporting these points need not be repeated. But ABMA respectfully suggests that in evaluating their merits, the Court should also bear in mind that there is here at stake an economic issue of transcendent importance throughout the United States, and that the "work preservation" construction of Section 8(e) is Board devised and not Congressionally imposed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed insofar as it sets aside the Board's findings that the Council did not violate Sections 8(e) and 8(b) (4) (A) of the Act.

Respectfully submitted,

KENNETH C. MCGUINESS,
STANLEY R. STRAUSS,

1750 Pennsylvania Avenue, N. W.
Washington, D.C. 20006

Attorneys for American Boiler Manufacturers Association.

Of Counsel:

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & MCGUINESS,
1750 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006.

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